In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-917

SAUL TURNOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of failing to file Employer's Quarterly Tax Returns (Forms 941) in ten of the eleven quarters between April 1, 1966, and December 31, 1968, in violation of 26 U.S.C. 7203. He was fined $2,000 and sentenced to nine months' imprisonment.

Petitioner, who holds a college degree in accounting (R. 227a, 261a),[1] was a partner in the painting business of Turnof and Sons and was responsible for recording and disbursing wages and filing the tax returns of the business (R. 31a-33a, 40a, 60a, 124a, 263a). Petitioner filed Forms 941 for the quarters between January 1, 1962 and March 31, 1964 (R. 89a, 264a-267a). He did not file Forms 941 for the quarters thereafter through March 31, 1966, and the Internal Revenue Service was required to collect the withholding tax liabilities for those quarters by levying on the firm's bank account on December 20, 1965, and on September 21, 1966 (R. 267a-269a, 300a). However, petitioner continued to refuse to file the Forms 941, even though he regularly received the preprinted forms from the Internal Revenue Service; instead, petitioner deducted income and social security taxes from employees' wages (R. 89a, 270a-271a) but retained the withheld taxes in the firm's bank account and distributed them to himself and the other partners together with the profits from operations (R. 205a). With the exception of four Forms 941 filed after the investigation was under way,[2] none was filed by petitioner for the quarters after April

[1] "R." references are to the printed appendix in the court of appeals.

[2] The Form 941 for the first quarter of 1968 was filed by petitioner shortly after his first interview, on August 26, 1968, with the investigating agent (R. 45a, 59a), and Forms 941 for the last three quarters of 1966 were submitted by petitioner with a check during an interview with the investigating agent on June 29, 1969 (R. 92a).

1, 1964, although the Forms 941 for 1965 were executed for the firm by the Internal Revenue Service in connection with the levy on September 21, 1966 (R. 45a-50a, 62a, 124a, 308a).

Petitioner informed the investigating agent that funds had been available to make timely payment of taxes due for the prosecution periods but that he had been "too busy" (R. 62a, 287a). He also claimed that the prior levies had exceeded the amounts actually due (R. 239a, 300a). Petitioner testified at trial that the partnership had adequate records and funds to make timely payments, and that he had assured the investigating agent that he would "straighten it out" (R. 259a, 270a-271a, 286a-287a). Petitioner's principal defense at trial was that his failure to file was not willful. With respect to the issue of willfulness, the jury was instructed that (R. 374a-375a):

> * * * a wilful failure is one which is voluntary, purposeful, deliberate and intentional as opposed to one which is accidental, inadvertent or careless. * * * An omission or failure to act is wilfully done, as I stated to you before, if done voluntarily and intentionally and with a specific intention to fail to do something the law requires to be done. That is to say, with a bad purpose either to disobey or to neglect or to disregard a legal duty.

At the request of petitioner's counsel (R. 346a-347a, 385a), the jury was also instructed that prior overpayment of tax (through the earlier levies, which petitioner alleged to be excessive) could be considered

on the issue of willfulness (R. 373a). Petitioner made no objection to the court's instructions on willfulness (R. 384a-386a).

1. Petitioner now contends (Pet. 5-7) that the district court's instructions on willfulness denied him a fair trial. However, petitioner's failure to object to these instructions at trial forecloses this contention. Rule 30, Fed.R.Crim.P. In any event, the instructions were correct. The court's instructions with respect to the allegedly excessive levies simply and correctly stated that a prior overpayment does not relieve a taxpayer of his obligation to file a return for subsequent periods.[3] The general instructions with respect to willfulness charged the jury clearly that a failure to file a tax return must be intentional and not merely accidental.[4] This is the prevalent will-

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[3] Petitioner seems to suggest that this instruction prevented the jury from considering his claim that he was "under the impression" the government would prepare his returns. Any relationship between the instruction and such a claim is tenuous at best. Furthermore, petitioner requested no instruction based on such claim. To the contrary, he testified at trial that it had never been suggested to him that the government might prepare his returns (R. 309a).

[4] Petitioner contends (Pet. 6-7) that the appearance of the word "mainly" rather than "namely" in the charge as reported could have confused the jury as to the distinction being drawn between intentional and accidental conduct. Assuming that the judge actually said "mainly", it is nevertheless not clear how that could have misled the jury concerning the substance of the willfulness standard it was to apply. Such inadvertent mis-speaking cannot reasonably be considered misleading (cf. *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822), and the

fulness standard under Section 7203, and it is, if anything, favorable to the defendant. Compare *United States* v. *Platt*, 435 F. 2d 789 (C.A. 2), *United States* v. *Vitiello*, 363 F. 2d 240 (C.A. 3), and *Haner* v. *United States*, 315 F. 2d 792 (C.A. 5) (imposing a standard of intentional conduct),[5] with *Abdul* v. *United States*, 254 F. 2d 292 (C.A. 9) (applying a standard of merely negligent conduct).[6]

2. There is no merit to petitioner's contention (Pet. 7-8) that the evidence did not support the verdict. The evidence showed that petitioner consciously and willingly disregarded his obligation to file federal tax returns. No more is required for proof of a violation of Section 7203. See, *e.g.*, *United States* v. *Schipani*, 362 F. 2d 825, 831 (C.A. 2), certiorari denied, 385 U.S. 934.

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further elaboration of the charge (see *supra*, p. 3) prevented the jury from mistaking the proper standard to be applied.

[5] Although petitioner suggests (Pet. 8-10) that *Platt* and *Vitiello* are in conflict, they in fact apply the same standard. The fact that the Third Circuit in *Vitiello* characterized intentional misconduct as having an "evil motive" (363 F. 2d at 241-242) whereas the courts below speak in terms of "bad purpose" (see *supra*, p. 3) obviously does not represent a disagreement about the substantive meaning of "willfully."

[6] See, also, *United States* v. *Bishop*, No. 71-1698, certiorari granted October 10, 1972, where we support a willfulness standard of intentional conduct for the related tax misdemeanor under 26 U.S.C. 7207.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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